Progressive Medical Group, Inc., t/a Walnut Hill Convalescent Center *and* United Food and Commercial Workers Union, Local 157, AFL-CIO. Case 5-CA-12126

February 17, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On August 25, 1981, Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Progressive Medical Group, Inc., t/a Walnut Hill Convalescent Center, Petersburg, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] In that portion of his Decision entitled "I. Preliminary Observations," par. 5, the Administrative Law Judge inadvertently stated that the parties' second bargaining session took place on June 29, 1979. However, as reflected in the record and elsewhere in the Administrative Law Judge's Decision, the second bargaining session, in fact, occurred on June 27, 1981.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain in good faith with, and to execute and honor collective-bargaining agreements concluded with, the Union or any other exclusive representative of employees in an appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by the National Labor Relations Act.

WE WILL forthwith sign and honor the collective-bargaining agreement with United Food and Commercial Workers Union, Local 157, AFL-CIO, which was agreed upon on February 13, 1980, and which covers our employees in the following appropriate unit:

All full-time and regular part-time service and maintenance employees employed at Walnut Hill Convalescent Center, Petersburg, Virginia, but excluding all office clerical employees, administrator, director of nursing, executive housekeeper, food service supervisor, licensed practical nurses, registered nurses, guards, and supervisors as defined in the Act.

WE WILL give effect retroactively to the terms and provisions of the collective-bargaining agreement referred to above, as required by the Board.

WE WILL make whole, with interest, our employees in the bargaining unit described above for any loss of wages and other benefits they may have suffered by reason of our failure to sign and effectuate all terms of the above agreement.

PROGRESSIVE MEDICAL GROUP, INC.,
T/A WALNUT HILL CONVALESCENT
CENTER

DECISION

STATEMENT OF THE CASE

BERNARD RIES, Administrative Law Judge: This matter was heard in Petersburg, Virginia, on February 23 and 24, 1981. At issue is whether as the complaint alleges, Respondent violated Section 8(a)(5) of the Act by refusing, since or about February 14, 1980, to embody in writing a collective-bargaining agreement assertedly consummated on that date.

Briefs have been received from the parties. Having considered the entire record[1] and the briefs, as well as my recollection of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. PRELIMINARY OBSERVATIONS[2]

Respondent Progressive Medical Group, Inc., headquartered in Virginia Beach, Virginia, operates 32 nursing homes in several States. The home involved in the present proceeding is located in Petersburg, Virginia, and is known as Walnut Hill Convalescent Center.

In 1978, when the home was owned by another corporation called Guardian Care, its 70-75 maintenance and service employees voted to be represented by the Union for purposes of collective bargaining. No bargaining ensued and, in January 1979, the Board held that Guardian Care had violated Section 8(a)(5) by refusing to honor its statutory obligations.

In April 1979, Respondent acquired a lease on the facility and agreed to recognize and bargain with the Union. Thereafter, beginning in June, Respondent and the Union held a series of negotiating sessions and, by December 1979, a complete bargaining agreement had been hammered out by the negotiators. On February 13, 1980, the unit employees ratified the agreement. Since then, Respondent has failed to execute a written version of the contract. The issue presented, as expressly limited by counsel for the General Counsel at the hearing, is whether, once the employees had adopted the agreement on February 13, Respondent was bound to its terms and further bound, by virtue of the principle espoused in *H. J. Heinz Company* v. *N.L.R.B.*, 311 U.S. 514, 523-526 (1941), to commit itself in writing to those terms.

Respondent's justification for its failure to sign the agreement presented, and its defense to the present complaint, is that the parties had agreed at the outset that Respondent's negotiators had no independent authority to bind the company and that only Respondent's board of directors could finally approve any agreement; that being the case, Respondent contends, no contract came into being on February 13, 1980, when the employees ratified the agreement, and no contract has yet come into being, for the simple reason that the board of directors has never acted upon the negotiated terms.

There is no question that early in the negotiations, the Union was informed that Respondent's directors had to play a role in the bargaining process. Indeed, at the commencement of the hearing, The General Counsel stipulated that at the second bargaining session, on June 29,[3] 1979, Respondent's counsel Lawrence R. Siegel told the union negotiators, including Walter R. Lewis, the union president, that "the employer had a board of directors which had to ratify a final proposal."[4]

Despite the agreement by the parties to stipulate to the foregoing fact, testimony on the point was nonetheless adduced which to some extent—in an area where the precise words used are often of the utmost importance—clouded the stipulation. Thus, Union President Lewis said that on June 27, when the Union presented a lengthy proposal and Respondent negotiator Dana Brown essayed a joke about signing the document then and there (and presumably escaping to the sands of Virginia Beach, where the meeting was being held), attorney Siegel commented, "Well, we have a board of directors that may like to hear that." Lewis' reaction was purportedly to ask "Am I negotiating with someone that can complete a contract or ratify a contract or accept a contract," to which Siegel replied that he "personally cannot accept a contract or sign a contract but our side of the table can sign a contract." When Lewis asked what Siegel meant, the latter replied, "I cannot personally sign the contract but Mr. Brown is on the board of directors and our side of the table can sign a contract." Contrary to the stipulation, Lewis did not recall that Siegel said that the board had to "ratify" the agreement.

Dana Brown, who was present for Respondent at all bargaining sessions but one, and who became Respondent's chief spokesman on August 27,[5] testified that Siegel adverted to the role of the board of directors not only at the second meeting, but also at the first (which Lewis did not attend). Brown said that at the initial meeting, Siegel made it clear that "we were there to negotiate the contract and that we had to have board approval; the union would have to get their employees to ratify it, so did we have to have our board to approve our contract." At the second meeting, Brown said, Siegel repeated for Lewis' benefit, after Brown made his joke, that "we were there to negotiate a contract but as the union had to have their contract ratified we did too with the board of directors of PMG had to have anything approved that was done at the bargaining table, in words thereabouts."

Siegel testified that he pointed out at the first session that "we are dealing with a corporation, the corporation has a board of directors," and that Brown was only one of a number of such directors. He said that at the second session, after Brown's jocular remark, he prudently cautioned that "there is a board of directors that will have final say over what is negotiated, just as what I believe was said, the union indicated they had to take it back to their membership to get approval, we had to take it back to our board of directors to get approval, ratification of that which had been done at the table."

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[1] Errors in the transcript have been noted and corrected.

[2] The pleadings and the record establish, and I find, that it is appropriate for the Board to assert jurisdiction over Respondent, and that United Food and Commercial Workers Union, Local 157, AFL-CIO (the Union), is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] See Resp. Exh. 2.

[4] Lewis did not attend the first negotiating session on June 8; in his stead, he sent Mike Earman, president of Union District Council 25, and Dorman F. Watts, then organizing director of the Union. Earman thereafter took no part in the negotiations until August 27. Lewis took over as principal union spokesman beginning on June 27 and until the meeting of August 27, when he dropped out of the picture and turned the subsequent bargaining over to Earman (as chief negotiator) and Watts.

[5] Brown held a variety of positions with Progressive Medical Group and its affiliates. He was "director of operations for the corporation . . . director of the corporation, PMG, Incorporated; secretary to the board, president of Progressive Care, Rest and Medical Management; senior vice-president; secretary of all subsidiary corporations."

Contrary to the testimony of Brown and Siegel, Respondent's detailed bargaining session notes do not reflect that Siegel said anything on the subject of board approval at the first meeting. Those notes show, however, that Herbert Larrabee, who served as Respondent's principal negotiator until the August 27 meeting, when Brown took over, stated at the first meeting, "I have full authority to sign with one exception. I have key person here except board of directors. Here we have full authority to negotiate this agreement." Respondent's notes for the second session are supportive of Siegel's testimony. They show that after Brown's sally, Siegel said, "Also have Board of Directors that have to ratify it"; Lewis remarked, "I take it Board that has to ratify it is not here"; and Brown said, "I am only one here on the Board."[6]

The foregoing evidence plainly indicates that the Union was notified early on that Respondent's directors were to play a role of some sort before Respondent could be considered bound to any agreement. What that function was, and how and when it was to be exercised, was not defined by Respondent, and the record indicates that there could have been no clear understanding. Thus, while the parties stipulated that Siegel told Lewis that the directors "had to ratify a final proposal," Lewis' testimonial version was a far cry from that flat statement, and Siegel himself gave varying accounts which could have different connotations: the board "will have final say over what is negotiated"; "we had to take it back to our board of directors to get approval, ratification of that which had been done at the table."

The Board has held that "when an agent is appointed to negotiate a collective-bargaining agreement, that agent is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary." *University of Bridgeport*, 229 NLRB 1074 (1977).[7] There was, in this case, "clear notice" that Respondent's agents had no independent authority to bind the Company; there was not, in my view, "clear notice" that Respondent's board reserved the right to act upon the agreement only after it had been accepted by the bargaining unit, or at any other specific time, or that it reserved the right to formally consider the negotiated agreement in any particular fashion. It is further my view that there are two distinct grounds for holding Respondent to the negotiated contract: one is that it may properly be inferred that actual approval of the terms was given by Respondent's board; the other is that the Union was, on the evidence, justifiably led by Respondent's agents to believe that such approval had been given, and that, in the circumstances, the Union was entitled to rely on that belief.

II. ACTUAL APPROVAL

The record is not clear as to the number of bargaining sessions held during the summer and fall of 1979, but it does show that the parties made substantial progress, initialling their tentative agreement to various proposed noneconomic clauses at meetings on September 17 and November 9. Respondent displayed a cooperative attitude during this phase of the negotiations, even displacing its former spokesman when it appeared to negotiator Dana Brown that he was hindering progress.

On December 7, Brown, who had become Respondent's principal negotiator, presented the Company's first wage proposal to Mike Earman, then serving as the Union's chief spokesman. According to Earman's uncontradicted testimony, Brown "stated that he was authorized to offer a five-year wage package." When Earman replied that the Union would consider a contract of that length only if it could obtain a dues-checkoff clause, Brown "said that he would have to check on that." At the next meeting, on Decenber 11, Brown "indicated that the board would not go for checkoff under any circumstances," and he offered a 3-year package, which the Union accepted.

The record shows that this sort of interplay occurred frequently, with the Union making proposals or taking positions and Brown saying that he would check with higher authority and then reporting back. Earman so testified, and Brown referred to numerous occasions on which Earman asked him if he "thought your board would agree to this," and Brown answered, "I don't know but we will try." Brown further testified that he checked with other board members "probably after every session," "usually Mr. Cunningham [the board chairman who appears to be the principal owner of Respondent] and Mr. Wagner, the treasurer of the company." As to the 5-year-contract (including checkoff) package discussed on December 7, Brown stated that after Earman asked him to present the checkoff proposal to the board, Brown replied, "Yes, I will present it, but I think our chances are very slim in getting a checkoff." Brown testified that he thereafter "checked with some members on the board, enough that I thought that I had a feel for what the Board would do."

Earman testified that after the negotiators reached agreement on December 11, he told Brown that the Union would arrange a ratification meeting with the em-

[6] These notes were received after authentication by James Paxton, a corporate personnel official in attendance at the meetings. Prior to their receipt, Paxton testified that the typewritten minutes represented transcriptions "from my handwritten notes," and that he had reviewed the minutes for accuracy shortly after they were transcribed. Cases such as *N.L.R.B.* v. *Tex-Tan, Inc.*, 318 F.2d 472, 483-484 (5th Cir. 1963), authorize receipt of such evidence.

Subsequently, however, counsel for the General Counsel produced a set of handwritten notes of the second session which Paxton thought were probably made by one Karen Sherman, who also took notes at the meetings. Paxton then recalled that after each of the sessions he and Sherman would consult by telephone and, from their separate sets of notes, compose a finished, mutually agreed-upon, set. He said, however, that "largely what was transcribed here were Jim Paxton's notes."

A review of the transcription of the second meeting shows, however, that it is identical to the Sherman notes, right down to blank spaces, underscoring, and misspelling. For that reason, the notes are probably inadmissible. Furthermore, since Paxton at first flatly misrepresented the process which resulted in the transcription, and also displayed an open partisanship, I would not find reliable his uncorroborated testimony on any subject.

[7] Sec. 8(a)(5) does not demand that an employer be represented at the bargaining table by a negotiator with independent authority to bind the principal; however, the "lack of such authority is a factor to be considered in evaluating the employer's good faith," *N.L.R.B.* v. *Coletti Color Prints, Inc.*, 387 F.2d 298, 304 (2d Cir. 1967). Accord: *N.L.R.B.* v. *Fitzgerald Mills Corporation*, 313 F.2d 260, 267 (2d Cir. 1963). The present complaint, as explained by counsel for the General Counsel at the hearing, raises no issue of Respondent's *bona fide* or lack thereof.

ployees on December 16,[8] and "we set a date of December 31 to meet and sign the agreement with it to be effective January 1, 1980." Brown denied such an arrangement, saying rather that he told Earman that if the employees accepted the proposal he would present it to Respondent's lawyers and then to the board to approve it, and, if accepted by the board, "we have got a contract that will be effective January 1st." Having to choose between the two witnesses, I would credit Earman. Although both men were personally impressive, Earman's testimony here sounds real and Brown's does not. Moreover, there are serious lapses in Brown's testimony which are alluded to hereafter. Accordingly, I find that, on December 11, Brown agreed to sign the agreement on December 31 in the event that the employees ratified its terms on December 16.

The employees, however, rejected the proposed agreement. On December 20, Earman and Watts met with Brown in Petersburg to discuss the contract areas which seemed to trouble the employees. After that discussion, Brown agreed "to recommend" four specific changes in the existing agreement "when he returned to Virginia Beach," where the corporate headquarters are located. Earman told Brown that he had scheduled another ratification meeting for that evening, and that he did not wish to present the modifications to the employees unless they were "firm." Brown thereupon left the room for the purpose, Earman assumed, of making a telephone call. When he returned, Brown said, "Okay, that is our proposal as presented." Before the meeting ended on December 20, Brown initialled the changes in the four clauses, providing for a 2-cent increase in the starting rate and a 7-cent increase in the top rate; deletion of the $100 deductible for hospitalization insurance; an additional holiday for senior employees; and vacations for part-time employees.

Although Watts corroborated Earman's testimony that Brown had left the room on December 20 (saying that he would "have to check with somebody"), Brown denied having done so. I do not accept his testimony. Brown conceded that he had first told the union agents at that meeting that he would "have to go back to Norfolk or to Tidewater to check this out with certain members of the board," but said that he ultimately did no such checking because the changes were "very minor"; he testified that he "assumed the Board would go along with me and which I told Mr. Earman that I assumed they would." It is difficult to understand what would have so quickly turned Brown around from admittedly thinking that he could give no answer on the proposed modifications without personally returning to Virginia Beach, to a belief that the changes were so negligible that no consultations were necessary. I think it quite probable that he did leave the room to use the telephone.

The employees again refused to ratify the agreement on December 20. Earman so informed Brown, who said that the existing proposal was "all that he was authorized, or all that the company was prepared to offer."[9] Earman told Brown that some employees had not attended the December 20 meeting because of a conflict with Respondent's Christmas party, and that another vote would be taken on December 26. That vote, too, ended in rejection of the proposal.

The Union thereupon embarked upon a "home call" program to attempt to secure ratification. After thus explaining the contract to the employees, a fourth ratification meeting, on February 13, yielded a positive result for the Union.

Earman tried to telephone the good news to Brown; unable to reach him, Earman sent a telegram stating that the contract had been accepted and suggesting that they "meet as soon as possible to sign and implement the contract." Receiving no response, Earman made more unreturned calls to Brown and eventually spoke to him. Earman asked when they could "sit down to sign the agreement," and Brown said he would send his notes to Van Thiel, another company negotiator and also the administrator of one of Respondent's nursing homes in Newport News, so that Van Thiel could prepare a draft agreement which could then be compared to the Union's draft. It was around this time that Earman first heard rumors of a decertification effort at the Petersburg home.

On March 6, according to Earman, he received a draft agreement from Van Thiel. Apparently Earman had not prepared his own draft, but he reviewed Van Thiel's draft against his own set of initialled clauses, found two errors and, on March 11, sent the draft back to Van Thiel with the errors corrected and a cover letter explaining the changes.[10]

[8] It had been understood from the outset of negotiations that the final agreement would have to be voted on by the bargaining unit.

[9] Brown was not asked about this testimony.

[10] Respondent's counsel, Lawrence Siegel, who only attended the first three bargaining sessions, indicated in his testimony that the first he saw of any contract was in "the middle or the latter part of March 1980," when he received a copy of the agreement from Brown, covered by Earman's March 11 letter, together with a handwritten note from Brown commenting on one clause in the contract and an oral solicitation from Brown for an opinion "on the acceptability or the ambiguity of the contract." Siegel further testified that he did not believe that Van Thiel would have drafted such a lengthy document without coming to him, and that he himself had not drafted the contract, by implication, he contradicted Earman's testimony that Van Thiel had sent a draft contract to Earman.

When asked about the opening sentence of Earman's March 11 letter to Van Thiel ("We are in receipt of your copy of the collective-bargaining agreement between Local 157 and PMG, Inc. (Walnut Hill)"), Siegel speculated that Earman may have earlier sent Van Thiel a copy of a draft by Earman which Van Thiel had then returned. That speculation seems clearly erroneous, since, in his March 11 letter, Earman stated that he had changed the copy received from Van Thiel in two respects to correspond to the Union's "notes of negotiations." Obviously, if Earman had prepared the draft originally, it would already have reflected his notes. Moreover, the type face of the two pages on which appear the changes cited by Earman differs from that appearing on all the other pages, thus indicating that Earman had retyped two of the pages received from Van Thiel, as he testified.

It thus appears either that Van Thiel did independently prepare a contract which he thereafter sent to Earman, or that some other attorney prepared the document for Van Thiel, or that Siegel did so. No resolution of the source is necessary, since the only relevant point is that Earman was telling the truth in saying that he received a contract from Van Thiel.

Siegel testified, as earlier noted, that when he received the draft "in the middle or the latter part of March 1980," he also received an undated note, in Brown's handwriting, which reads as follows:

Continued

Earman's letter, a copy of which went to Brown, also asked Van Thiel and the other management representatives to choose a suitable time and place to "sign the agreement." Hearing nothing from Brown, Earman began trying to contact him. When he eventually did so, Brown told Earman that he would be out of town for a week, but would call when he returned. After more than an appropriate period had elapsed, Earman called Brown and finally caught him on March 31. Brown said that a decertification petition had been filed[11] and that he did not "think that we should meet to sign an agreement until after that is decided." On that day, Brown wrote a letter to Earman which repeated the information given over the phone and which ends, "I believe it would be inappropriate at this time to arrange a meeting *to sign the negotiated contract* until a decision has been rendered by the National Labor Relations Board." (Emphasis supplied.)

As earlier discussed, Respondent's *caveat* that the contract had to be approved by its board of directors was unspecific—it did not, for example, indicate that the terms had to be accepted by the directors only at a formal board meeting held after the unit employees had agreed to the proposal, as opposed to piecemeal informal acceptance as the bargaining progressed.[12] I think it may be fairly inferred from this record that whatever internal process Respondent believed to be necessary to constitute board approval was in fact had.

Respondent's board normally is comprised of eight members. Until November 1, 1979, the board consisted, in attorney Siegel's words, of four "inside" directors—Homer Cunningham, chairman of the board and, so Earman thought, the "principal owner"; Paul Karseras, the president of Respondent, who resigned as president and director on November 1; George Wagner, the treasurer; and Dana Brown—and four "outside" directors—a minister, a physician, a banker, and one of Siegel's law partners, whose firm is counsel to Respondent. The record shows that on January 2, the banker tendered his resignation effective January 15, leaving, at that point, only six directors.

Siegel testified that the board is a "very active" one which meets quarterly in Virginia Beach. One does not garner the same impression from the testimony of Brown, a member of the board. Asked how often the board meets, Brown replied, "Sporadic occasions. Last year [1980] it was very rarely. The year before that we tried to meet on a quarterly basis and sometimes we missed that. But, always on an annual basis."

It is obvious that a large corporation such as Respondent cannot be effectively operated by a board of directors which meets "sporadically," especially in view of the many pressing issues that must require timely action. For this reason, Respondent maintains an executive committee. Siegel testified that the committee normally consisted of the four "inside" directors, but that since no new director was appointed after Karseras' November 1 resignation, the executive committee, at least until March, consisted of Cunningham, Wagner, and Brown.[13]

The authority of the executive committee is unclear. Its powers are perhaps spelled out in the corporate bylaws, but Siegel was not sure about that, and the bylaws were not introduced. In Siegel's opinion, however, apparently shaped by his own prior legal advice, although there is "some area in which the executive committee has authority on its own to commit the corporation," that would not include "material matters that involved contracts, long-term duration or financial commitments." Siegel testified, however, that, if asked, he would advise the company that as to a day-to-day management function such as "whether to bargain with this union," the executive committee was empowered on its own to undertake such an action.

There are two other organized nursing homes in Respondent's control which have a collective-bargaining history. One is in Columbus, Ohio. According to Brown, after he negotiated a 3-year renewal contract with that union in 1977 or 1978, he presented the agreement to the board for ratification. The minutes of the board meeting at which such purported ratification was made were not put in evidence. Brown also testified twice on direct examination that an annual "wage and health benefits" reopener which he negotiated in early 1980 at the other unionized home in Newport News was submitted to the board for approval. On cross-examination, his further testimony on the subject went as follows:

Board Directors Reject Part of Sick Leave

Full time employees should only receive 10 sick days per year rather than the 12 and should be accumulated on the *employees anniversary date rather than calendar year.* Problem with the accumulated days per calendar year is if an employee is hired in December and gets sick in Jan—He would be entitled to 24 sick days.

The sick-pay clause in the contract prepared by Van Thiel shows that the negotiators had agreed upon allowance of 12 days of sick leave per year for full-time employees. Siegel's assertion is, therefore, that, sometime in March, long after Brown had signed off on such a provision (which, according to Brown's testimony, meant that "management and the Union negotiators were in agreement about what we should present" to their respective principals: "once we agreed upon the wordage or the verbiage of a contract or a particular point then they would present it to their people for acceptance and I would also do the same with my board of directors") and long after Brown had permitted the Union to present such a clause at four separate ratification meetings, Brown was recommending to his fellow directors that they reject the contract and thus presumably start anew the whole bargaining and ratification process. This would be, of course, a most gross breach of faith.

Two possibilities suggest themselves: one is that Siegel, who was "at a loss" at the hearing to explain why Brown would be recommending rejection of a term he earlier had deemed acceptable, may have had a memory lapse in recalling that in March he received from Brown a note he actually had received earlier; the other is that Brown gave Siegel the undated note in preparation for this case, willing to risk the inescapable inference of bad faith in an attempt to demonstrate that the contract, as far as he was concerned, remained in flux after the Union's ratification. Neither circumstance favors Respondent's case.

[11] However, although Brown wrote a letter making the same statement, according to a stipulation by the parties, the petition was not filed until April 3.

[12] See *University of Bridgeport, supra*, 229 NLRB at 1084, fn. 27: "[The Union] need not necessarily have been charged with knowledge that the Respondent's trustees must in all circumstances enter the picture only after full agreement apparently had been reached, as subsequent ratification is only one option open to the trustees."

[13] The January 2, 1980, board minutes show no appointments of a director or an executive committee member.

Q. Do you recall what your instructions were from the board of directors before you entered those [Newport News] negotiations concerning your authority?

A. Before we presented it back to the union, you mean?

Q. Yes.

A. Yes, I would informed [sic] the board of what we negotiated and they either approved it or rejected it.

Q. Do you recall when they approved it or rejected it?

A. No, sir, but it was prior to going into effect April the 15th.

Q. And it would have been at a board meeting, is that correct?

A. It could be an executive meeting too.

Q. Explain that to me.

A. Well, there are four members of the executive committee. They would present that to the board for ratification. It would be ratified by the board, certainly for ratification. It would be ratified by the board, certainly.

Q. So if it was done it would be recorded in the board minutes?

A. It would be. It may not be then but it would be at the next board meeting.

The following day, Corporate Personnel Director Paxton was asked by Respondent to contradict the testimony of a director—executive committee member—negotiator, Brown, that the Newport News wage and health benefits reopener had been submitted to the board, and he did so. So much, apparently, for Brown's recall that, prior to the Newport News negotiations, he had received "instructions . . . from the board" that he would "inform the board of what we negotiated and they either approved it or rejected it," and for his further testimony that, however it was done, the wage reopener would "certainly" have been ratified by the board. So much, also, it would appear, for Siegel's testimony that the executive committee cannot bind the board to "financial commitments."

If the two sets of minutes in evidence are any indication, what the board does mostly is to listen to reports. That is essentially all that happened at the January 2, 1980, meeting, at which 13 reports were given and one regional vice president appointed. At the September 11, 1979, meeting, however, two votes were taken. In one, the board voted "to radify [sic] the actions of the Board of Directors of Hospitality Health Care, Inc.," apparently a subsidiary, which had voted on August 27 to dissolve the corporation. Why Respondent's board had to ratify the action of another board is not disclosed.

The second vote on September 11 followed a statement by the chairman that "Progressive Medical Group, Inc. had just renewed the leases for the Medic Home Health Center" at 12 locations in Virginia and Florida. The minutes state: "On motion by Director Karseras and seconded by Director Farano the action of the Board of Directors of Progressive Medical Group, Inc. was radified [sic] and approved."

This is puzzling. Respondent is named in the complaint as "Progressive Medical Group, Inc." While the minutes are self-styled as the minutes of "PMG, Inc. Board Meeting," there is no indication in the record that there are two separate corporations operating under those two names. Yet, assuming they are one and the same, how could it be that the board of directors of "PMG, Inc." would be ratifying the action taken by "the Board of Directors of Progressive Medical Group, Inc.?" If the minutes are in error, and intend to say that the action of the "executive committee" was approved, then it would seem that, according to Siegel, the committee acted beyond its authority in "renewing" leases for 12 homes. Siegel stated that that function of the committee would be to seek out the most desirable properties to operate, "but the actual determination of do we go forward, do we commit the corporation to a five or ten-year lease agreement with certain financial commitments, that would be submitted to the board of directors."[14]

The foregoing discussion leaves the distinct impression that Respondent is run by the executive committee (Siegel said that he attended perhaps 50 executive committee meetings in 1979, and there were others that he missed) and that, in many areas, approval of a corporate action by the executive committee is binding upon, and equivalent to sanction by, the board of directors. If the executive committee is authorized independently to agree to a wage and health benefits increase at Newport News, or to "recognize this union," it seems reasonable to infer that it is empowered, on behalf of the board, to approve a collective-bargaining agreement.[15] Wages and health benefits undoubtedly are among the most significant elements of a collective-bargaining agreement, and it seems reasonable to say that an executive committee authorized to make commitments in those areas is equally authorized to act upon a comprehensive bargaining agreement. This makes particularly important Brown's testimony that "probably after every session" at the bargaining table, he checked with members of the board, "usually Mr. Cunningham and Mr. Wagner. In November, December, and January, Brown, Cunningham, and Wagner constituted the entire executive committee.

Other evidence tends to show that Brown received, right along, approval of his every action from those whose approval he believed to be critical. He told Earman on December 7 that he was "authorized" to offer a 5-year package. After Brown had "check[ed]" on Earman's counterrequest for a checkoff clause, Brown returned on December 11 to say that "the board would not go for checkoff under any circumstances." When the negotiators then agreed to the 3-year contract, Earman and Brown, as I find, "set a date of December 31 to

[14] A further complication is added by the fact that the answer to the complaint in this case denied the allegation that Respondent "operates a nursing home at its Petersburg, Virginia location," asserting instead that "the operator of the said nursing home is Walnut Hills Convalescent Center, Inc., a Virginia corporation." Nothing came into the hearing record about that corporation.

[15] In view of Brown's demonstrated unreliability, and in the absence—I should call it a meaningful absence—of board minutes showing that the board ratified the Columbus, Ohio, bargaining agreement, I cannot accept Brown's assertion that it did so.

meet and sign the agreement with it to be effective January 1, 1980." I note that, as of December 11, the board was presumably not scheduled to meet until January 2, when it did routinely convene.

On December 30, Brown agreed to four modifications of the package only after, as I find, being told by Earman that he needed "firm" commitments and leaving the room for the obvious reason of soliciting approval from the home office. In his March 31 letter, Brown made a telling statement indicating that there had been all the approval necessary for Respondent's purposes, by declining to "arrange a meeting to sign the negotiated contract" until the Board had acted. The implications of Brown's tacit assumption that there was no need for further board consideration are manifest.

It seems fair to say that, as of February 1980, there had been effective adoption of the negotiated agreement by the entire executive committee (Brown, Cunningham, and Wagner), which would appear to have been sufficient to bind the board of directors. There had also been, I infer, such adoption by at least half of the (after January 15) six-member board (Brown, Cunningham, and Wagner). It would be whimsical, I think, to argue that all three of the remaining directors (a minister, a physician, and a counsel to the board) would have voted in disagreement with the three "inside" directors on this matter.[16] In my view, Brown was correct in implying on March 31 that all that needed to be done, other than settle the decertification problem, was to "arrange a meeting to sign the negotiated contract."[17] Cf. *N.L.R.B.* v. *Coletti Color Prints, Inc., supra*, 387 F.2d 298; *N.L.R.B.* v. *Marcus Trucking Company, Inc.*, 286 F.2d 583 (2d Cir. 1961).

II. APPARENT APPROVAL

Based on much the same evidence, I believe, in addition, that Brown had apparent authority to, and did, convey to the Union that the precondition of higher approval had been satisfied.

Collective-bargaining agreements are not "ordinary contracts" and are not "governed by the same old common-law concepts which control . . . private contracts." *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*, 385 U.S. 157, 160, 161 (1966). While the differences between commercial contracts and bargaining agreements are manifest, the cases have not clarified the extent to which the "national labor policy" may require that common law principles yield to the imperatives of that policy. See *John R. Lewis et al.* v. *Mears Coal Company*, 297 F.2d 101 (3d Cir. 1961); *John R. Lewis, et al.* v. *Lowry Coal Company*, 295 F.2d 197 (4th Cir. 1961).

One authority, recognizing bargaining agreements as something "beyond the ordinary commercial covenants entered into by businessmen," nonetheless states, "Basically . . . mutuality of assent is essential and the usual requisites of a contract must be met." Williston on Contracts, 3d ed., sec. 1020 A. That proposition seems sound, with the addendum, however, that the "crucial inquiry" here "is whether the two sides have reached an 'agreement' even though that 'agreement' might fall short of the technical requirements of an accepted contract." *N.L.R.B.* v. *Donkin's Inn, Inc.*, 532 F.2d 138, 141 (9th Cir. 1976).

In this case, it seems to me that the normal rules of agency compel a conclusion that an agreement was, indeed, reached once the proposed contract had been ratified by the employees on February 13. An agent whose authority depends on a contingency may have apparent authority to convey to a third party the satisfaction of that contingency. Restatement (Second), *Agency* § 170. Clearly, when Respondent's negotiators were authorized by Respondent to bargain, to announce to the Union that the board of directors had to approve the terms, and to sign an approved agreement, they were also implicitly clothed with the authority to communicate the fact that the approval had indeed been given. Brown did not announce such approval in formal language, but everything he did delivered that message.

I hesitate to use the word "universal," but I would unhesitatingly say that the commonplace practice in these matters is that once the negotiators have reached agreement at the bargaining table, the subsequent ratification by unit employees makes a contract. It is inconceivable to me that either Brown or Earman even remotely considered that employee ratification would not put an end to the approval process. I have no doubt that when Earman and the other union staff went four times to Petersburg to discuss the proposed contract with the employees on two shifts and to allow each shift to vote (apparently in rented hotel space for the first two meetings), and conducted a "home call" program prior to the last vote, they fully believed that nothing was left but to convince the employees to accept the contract.[18] I also have no doubt that Brown knew that Earman so believed, and that Brown was of the same opinion.

Bearing in mind the several indications given by Brown to Earman that he was receiving the ongoing guidance and approval of the board,[19] and Brown's assurance to Earman that the December 20 modifications were "firm," I conclude that Brown effectively communicated to Earman on that day that the required approval

[16] Compare *Darlington Manufacturing Company, et al.* v. *N.L.R.B.*, 397 F.2d 760, 770 (1978), where the Court of Appeals for the Fourth Circuit, sitting *en banc* (Judge Bryan dissenting), seemed willing to impute the motive of one individual, whose family interests controlled the company, to the remaining corporate directors. The court noted, "The Board did not have to shut its eyes to the fact that corporate directors are frequently responsive to interests that control the majority of a corporation's stock."

[17] See *James F. Stanford, Inc. d/b/a Ace Machine Co.*, 249 NLRB 623, 636-638 (1980), where the negotiator had cautioned at the outset that his decisions would be subject to the approval of the board of directors. The Board, inferring from the record before it that "it is hardly conceivable that the board of directors was not fully aware of the progress of the negotiations as they proceeded over a period of approximately 1 year," construed the "apparent knowledge" of the board of directors as satisfying the requirement of approval.

[18] Earman testified, "I would never have presented it to the employees at the first or second meeting had I been led to believe that after they approved it, then the board had to. That would make us look stupid."

[19] For example, Brown conceded that he told Earman on December 7 that he would "present" the checkoff proposal to the board, and Earman testified that Brown came back on December 11 and "indicated that the board would not go for checkoff under any circumstances."

had been received and that such communication was within Brown's apparent authority to make.[20]

Accordingly, I find that by failing and refusing to execute the negotiated agreement within a reasonable time after February 13, 1980, Respondent violated Section 8(a)(5) and (1) of the Act.[21]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By, on or about February 14, 1980, refusing to execute and honor a written agreement embodying terms and conditions of employment agreed to with the Union on February 13, 1980, Respondent violated Section 8(a)(5) and (1) of the Act.

4. The foregoing unfair labor practice affects commerce within the meaning of Section 2(6) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Having found that Respondent, on or about February 14, 1980, repudiated and, since on or about that date, has refused to execute the contract which was agreed upon on February 13, 1980, by Respondent and the Union, I shall recommend that Respondent be required to execute that agreement forthwith and to give effect to all terms and provisions of that agreement retroactively to February 13, 1980.[22] The loss of earnings, if any, under the Order recommended herein shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[23]

Finally, I shall recommend that, upon request, Respondent bargain with the Union as the exclusive representative of the employees in the appropriate unit, and be required to post customary notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[24]

The Respondent, Progressive Medical Group, Inc., t/a Walnut Hill Convalescent Center, Virginia Beach, Virginia, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with, and to execute and honor collective-bargaining agreements concluded by it with, United Food and Commercial Workers Union, Local 157, AFL-CIO, or any other labor organization.

(b) In any like or related manner coercing, restraining, or interfering with the rights accorded employees by Section 7 of the Act.

2. Take the following action which is deemed necessary to effectuate the policies of the Act:

(a) Forthwith execute the collective-bargaining agreement consummated by Respondent and the Union on February 13, 1980, with respect to the following bargaining unit:

> All full-time and regular part-time service and maintenance employees employed at Walnut Hill Convalescent Center, Petersburg, Virginia, but excluding all office clerical employees, administrator, director of nursing, executive housekeeper, food service supervisor, licensed practical nurses, registered nurses, guards, and supervisors as defined in the Act.

(b) Upon execution of the aforesaid agreement, give retroactive effect to the provisions thereof and, in the manner set forth in the section herein entitled "The Remedy," make whole the employees, with interest, for any loss they may have suffered by reason of Respondent's failure to sign and effectuate all terms of the agreement.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its facility in Petersburg, Virginia, copies of the attached notice marked "Appendix."[25] Copies of said notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to

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[20] Cf. *Niagara Therapy Manufacturing Corporation*, 237 NLRB 1, 4 (1978), where the Administrative Law Judge, in a portion of his Decision not appealed to the Board, held: "While Lundgren stated at the outset the concurrence of his superior or superiors at the Company's home office to any agreements he reached would be necessary, his conduct during the course of negotiations led the Union's representatives (and would lead any reasonable person) to conclude that Lundgren had received such concurrence or authorization."

[21] It may also be that the principle of estoppel operates here to commit Respondent to the contract. See Restatement (Second), *Agency* §§ 8B, 141.b.

[22] Earman's testimony indicates that he agreed with Van Thiel around the end of February that the effective date of the wage provision should be March 1, 1980. Accordingly, the retroactivity requirement, if any, with respect to wages shall be effective as of March 1, 1980.

[23] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[24] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[25] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.